No. 89-1602

In the Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's appeals from orders that applied the terms of a decree to which petitioner had consented.

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OPINIONS BELOW

The orders of the court of appeals dismissing the appeals, Pet. App. 1a, 2a, are unreported. The order of the court of appeals denying the petition for rehearing and suggestion of rehearing en banc, Pet. App. 26a-27a, is unreported. The district court order of October 18, 1989, Pet. App. 3a-18a, is reported at 723 F. Supp. 203. Two other district court orders at issue, entered on October 18 and November 16, 1989, Pet. App. 19a-20a, 21a-25a, are unreported.

JURISDICTION

The orders of the court of appeals dismissing the appeals were entered on December 13, 1989. The order denying the

petition for rehearing and suggestion of rehearing en banc was entered on February 12, 1990. The petition for a writ of certiorari was filed on April 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, the United States filed this civil action seeking relief against petitioner under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq*. The complaint alleged that the Teamsters union had long been under the control of organized crime, and it sought equitable relief to rid the union of such control. Compl. at 109-111.

On the eve of trial, the parties agreed to a consent decree, which the district court entered as an order of the court. Pet. App. 28a-56a. The consent decree permanently enjoins petitioner's officers, members, and employees from engaging in racketeering activity and from knowingly associating with organized crime families generally, and with La Cosa Nostra families in particular. Pet. App. 33a. The consent decree further provides that the court will appoint three officers: an Independent Administrator, an Investigations Officer, and an Election Officer. *Ibid*. The Administrator is mandated to discipline corrupt officials, appoint temporary trustees to run the affairs of affiliated entities, and oversee the activities of the other two officers. Pet. App. 34a. The Investigations Officer is commissioned to investigate disciplinary charges and institute trusteeship proceedings. The Election Officer is authorized to supervise the balloting process and certify elections. Pet. App. 41a.

The consent decree provides for ongoing district court jurisdiction "to supervise the activities of the Administrator and to entertain any future applications by the Administrator or the parties." Pet. App. 49a. At the same time,

the decree provides that "[n]othing herein shall be construed as authorizing the parties or the Court-appointed officers to modify, change or amend the terms of this Order." Pet. App. 44a. The decree provides for entry of final judgment "[u]pon satisfactory completion and implementation of the terms and conditions of this order," at which time the district court "shall entertain a joint motion of the parties hereto for entry of judgment dismissing the action with prejudice." Pet. App. 29a.

2. In October 1989, petitioner applied to the district court for an order forbidding certain actions by the Election Officer. Petitioner sought, *inter alia*, to prevent the Election Officer from monitoring the local elections leading up to the 1991 election of petitioner's International officers. Pet. App. 5a. Petitioner also objected to the Election Officer's having any staff, and to the creation of a $100,000 operating fund of *federal* moneys from which the three court officers could be paid pending reimbursement by the union. Pet. App. 12a-16a. Petitioner reserved the right to refuse to pay for any activities it deemed to be outside the scope of the consent decree. Pet. App. 5a.

The district court rejected petitioner's arguments as flatly inconsistent with the express terms of the consent decree. Observing that the "purpose of the Consent Decree is to rid the union of the hideous cloud of corruption that envelops it," and advising the parties to "adhere by the letter of the Consent Decree," the district court urged that "the Court Officers must not be hampered in the performance of their obligatory duties." Pet. App. 18a.

Accordingly, the district court approved the Election Officer's supervision of the entire 1991 election, and not just the final vote for the International officers. Pet. App. 8a-10a. The district court agreed with petitioner that it "need only look to the plain language of the Consent Decree to interpret its meaning." Pet. App. 8a n.2. But "following

[petitioner's] argument that the Consent Decree must be interpreted according to its terms," the district court "f[ou]nd that the term '1991 election' * * * was intended to encompass the entire electoral process which will culminate in the 1991 election for International Officers." Pet. App. 9a-10a.

The court further found that the Election Officer's broad powers to "supervise" the 1991 election included the powers to promulgate election rules and procedures, and to oversee, coordinate, and direct the nomination and election process. Pet. App. 7a-8a, 10a. In light of the Election Officer's duty to supervise more than 660 local elections involving 1.7 million voters, Pet. App. 12a-13a, and the decree's explicit provision for hiring and compensating the Administrator, Investigations Officer, Election Officer, "and any designee or persons hired by them," Pet. App. 43a, the district court found the Election Officer's staffing and funding requests to be entirely consistent with the terms of the decree. Pet. App. 12a-17a.

3. In November 1989, the Administrator learned that petitioner planned to publish the *International Teamster* magazine quarterly, rather than monthly, ostensibly as a cost-cutting measure. The Administrator thereupon applied to the district court for an order requiring petitioner to publish his reports on a monthly basis. Pet. App. 21a-24a. The Administrator simultaneously sought to clarify petitioner's duty to publish the district court's orders. Pet. App. 22a.

The district court agreed with the Administrator's application on both points. First, observing that the consent decree specifically provides that the "Administrator shall have the authority to distribute materials at reasonable times to the membership of the [union] about the Administrator's activities," and that he "shall have the authority to publish a report in each issue of the *International Teamster* concerning the activities of the Administrator, Investigations

Officer and Election Officer," Pet. App. 42a, the district court reasoned that the consent decree required monthly reports to petitioner's members. Pet. App. 22a-24a. But the district court did not require petitioner to continue monthly publication of the *International Teamster*. To the contrary, it ruled that the required reports "may be made either (a) by continued monthly publication of the *International Teamster* or (b) by monthly mailing of a report by the Independent Administrator to [petitioner's] rank and file as a whole at [petitioner's] expense." Pet. App. 24a. See Pet. App. 42a (provision of consent decree that "[t]he reasonable cost of distribution of these materials shall be borne by the [union]").

Second, the district court held that petitioner is required to distribute the court's orders and opinions intact, without commentary, editing, or embellishment. Pet. App. 24a. The court later clarified that its order only precluded petitioner from distributing a marked up version of the court's order (*i.e.*, with marginal notes), and that petitioner is completely free to comment on and criticize the court's orders in its magazine. D. Ct. R. 835. See Pet. 11 n.17.

4. Petitioner sought review of the district court's orders in the Second Circuit. The United States moved to dismiss the appeals on the ground that the district court's orders merely applied, and in no way altered, the terms of the consent decree, and that the district court's action was thus not appealable—regardless of petitioner's characterization of that action. With respect to the order upholding the Election Officer's powers, the government contended:

> When it agreed to the Consent Order, [petitioner] "waived its objections to the terms of the order." Thus, [petitioner] waived its right to litigate—or to contest on appeal—the substance of the terms of the Consent Order. The Court should dismiss this appeal for lack of jurisdiction because the appeal, in essence, directly

challenges the very Election Officer powers [petitioner] agreed to in the Consent Order.

* * * * *

If consent agreements truly are to serve the purpose of reducing litigation, the parties should not be able to generate appeals challenging the substance of the agreement by obstinate disagreement with the general principles to which they previously consented. [Petitioner] has done nothing more than attack the very agreement it entered into regarding the Election Officer's supervisory powers. Accordingly, the appeal should be dismissed.

89-6252 Gov't C.A. Mem. at 8-10. Similarly, with respect to the order discussing the frequency and content of reports to petitioner's members, the government maintained:

* * * [Petitioner] seeks to renege on its agreement to allow the Administrator to report to the union membership * * *

* * * [This order] does not raise an issue of interpretation sufficient to invoke appellate jurisdiction. [Petitioner] agreed that the Administrator could report to the membership in each issue of the *International Teamster* and, at the time the Consent Order was entered, [petitioner] published the magazine monthly. Considering the context surrounding entry of the Consent Order, the district court appropriately concluded, in the course of supervising this complex Consent Order, that the Administrator should have a channel open to distribute reports at least monthly. * * *

When [petitioner] agreed to the Consent Order, [it] "waived its objections to the terms of the order." Thus, [petitioner] has waived its right to litigate—or to contest on appeal—the basic power conferred on the Administrator to report to the membership under Con-

> sent Order ¶ 12(E). The district court did no more than confirm that stipulation. Accordingly, the Court should dismiss this appeal for lack of jurisdiction because it raises no substantial interpretive issue under the Consent Order.

89-6254 Gov't C.A. Mem. at 9-10 (citations omitted).

Petitioner opposed the government's motions. It insisted that the district court had recognized authority in the court-appointed officers in excess of that conferred by the consent decree, and argued that jurisdiction existed under 28 U.S.C. 1291 and 28 U.S.C. 1292(a)(1). At no point, however, did petitioner argue that dismissal was an inappropriate disposition if the court of appeals rejected petitioner's contentions. See 89-6252 Pet. C.A. Mem. at 11; 89-6254 Pet. C.A. Mem. at 10.

On December 13, 1989, the Second Circuit issued two orders, both of which stated that the panel, having considered the government's motion to dismiss the appeal, "hereby [ ] grant[s]" that motion. Pet. App. 1a-2a. On February 12, 1989, the Second Circuit denied petitioner's petition for rehearing and suggestion of rehearing en banc. Pet. App. 26a-27a.

ARGUMENT

Petitioner "do[es] not contend that *every* ruling construing the terms of a consent decree is invariably entitled to appellate review." Pet. 13-14. Indeed, it could not. For it is well settled that "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." *Swift & Co.* v. *United States*, 276 U.S. 311, 324 (1928) (quoting *Nashville, Chattanooga & St. Louis Ry.* v. *United States*, 113 U.S. 261, 266 (1885)). See *United States* v. *Babbitt*, 104 U.S. 767, 768 (1881) ("The consent to the judgment below

was in law a waiver of the error now complained of."); *Pacific R.R.* v. *Ketchum*, 101 U.S. 289, 295 (1879) ("If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent * * *."); *Cohen* v. *Virginia Elec. & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986); *White* v. *Commissioner*, 776 F.2d 976, 977 (11th Cir. 1985) (collecting cases). See also *United States* v. *Procter & Gamble*, 356 U.S. 677, 680 (1958) ("[T]he familiar rule [is] that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error.").

In this case, the district court found that the powers opposed by petitioner and asserted by the court-appointed officers were authorized by the express terms of the consent decree. Accordingly, to the extent that the court of appeals agreed with these determinations by the district court, it properly dismissed the appeals, because petitioner had waived its objections to the exercise of those powers by acceding to the consent decree.

That the court of appeals might also have summarily affirmed the district court on the merits is immaterial in this circumstance. On review of the terms of a consent decree, no difference of substance exists between (a) dismissing the appeal because the district court correctly determined that the party had consented to the order (and therefore waived an appeal); and (b) affirming the district court's underlying determination that the party consented to the order. In either event, the decision below represents the court of appeals' determination that, in the circumstances presented, petitioner consented to the orders entered by the district court and cannot now be heard to impeach them. Nor is there doubt that waiver underlies the court of appeals' dismissal, because the government urged precisely that ground in its motions to dismiss.

In sum, the court of appeals' decision correctly upholds the parties' consent decree settling serious racketeering charges against petitioner. The parties' fact-bound dispute over the meaning of that agreement does not merit review by this Court.

1. Regardless of whether an order is otherwise appealable as a final decision under 28 U.S.C. 1291, an appealable collateral order under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), or an interlocutory order under 28 U.S.C. 1292(a), a party's agreement to that order waives appellate review of the matters to which consent has been given.[1] *Swift & Co.* v. *United States*, 276 U.S. at 324; *Nashville, Chattanooga & St. Louis Ry.* v. *United States*, 113 U.S. at 266; *United States* v. *Babbitt*, 104 U.S. at 768; *Pacific R.R.* v. *Ketchum*, 101 U.S. at 295; *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 889, 893 (9th Cir. 1986) ("dismiss[ing] Wickland's appeal on this claim for lack of jurisdiction" from a "final judgment" on a voluntarily-dismissed claim "because it is not an involuntary adverse judgment"); *Cohen* v. *Virginia Elec. & Power Co.*, 788 F.2d at 249-250 (dismissing appeal from consent judgment notwithstanding argument that consent went only to amount of fees awarded and not to underlying determination of liability, because "the plain language of the consent order makes clear that the parties are acquiescing in the award of attorneys fees"); *White* v. *Commissioner*, 776 F.2d at 977-978 (dismissing appeal from stipulated judgment

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[1] Of course, a party may obtain appellate court review of the contentions that no consent was given (*e.g.*, the supposed consent was the product of mistake or fraud), and that the court lacked subject matter jurisdiction. *Swift & Co.* v. *United States*, 276 U.S. at 324; *Pacific R.R.* v. *Ketchum*, 101 U.S. at 295; *Shores* v. *Sklar*, 885 F.2d 760, 762 (11th Cir. 1989); *White* v. *Commissioner*, 776 F.2d at 977-978; *Coughlin* v. *Regan*, 768 F.2d 468, 469-470 (1st Cir. 1985); *United States* v. *Bechtel Corp.*, 648 F.2d 660, 663 (9th Cir.), cert. denied, 454 U.S. 1083 (1981).

in which taxpayers consented to reduction in amount of deficiency); *Haitian Refugee Center* v. *Civiletti*, 614 F.2d 92, 93 (5th Cir. 1980) (per curiam) (dismissing appeal by government from consent order entering interlocutory injunction, despite government's argument that trial court proceedings were taking longer than anticipated at time consent was given).

Petitioner does not disagree that consent to a judgment waives appellate review of the merits. Indeed, the cases cited in the petition, Pet. 16, 21, including those of the Second Circuit, Pet. 15 n.24, hold only that plenary appellate review of an order relating to a consent decree is proper when the order is one to which no consent has in fact been given. See, *e.g.*, *United States* v. *Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1082 (3d Cir. 1987) (district court's order, "[w]hether viewed as an indefinite stay or an amendment of the Consent Decree," is "final and appealable" under 28 U.S.C. 1291); *United States* v. *Western Elec. Co.*, 777 F.2d 23, 24, 27, 29 (D.C. Cir. 1985) (dicta) (a district court order disposing of a "Baby Bell's" request to waive restrictions in the AT&T consent decree and enter a new line of business would be "subject to appeal as a final decision" under 28 U.S.C. 1291 and 1292(a)(1)); *Sperry Corp.* v. *Minneapolis*, 680 F.2d 1234, 1236-1237 (8th Cir. 1982) (appellant, which was not even a party to the consent decree, could appeal "denial of a motion to modify an injunction" entered in a separate lawsuit under 28 U.S.C. 1292(a)(1)); *Roberts* v. *St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981) (order enforcing consent decree that had allegedly expired five years earlier constituted an appealable order under 28 U.S.C. 1292(a)(1)). The parties therefore agree that unconsented-to orders that are otherwise appealable are reviewable on the merits, while consented-to orders are not.[2]

[2] Although petitioner refers to the district court's orders as interpreting the consent decree, and cites a series of appellate cases where

2. In this case, the court of appeals correctly determined that petitioner had consented to the district court's orders (and thereby waived appellate review of the merits of those orders) by its agreement to the consent decree.

A. Petitioner renews its contention—rejected explicitly by the district court and implicitly by the court of appeals—that the Election Officer's duty to "supervise the IBT election . . . to be conducted in 1991," Pet. 5, limits him to certifying the final vote for the International officers in 1991. Pet. 5-6, 16-17.

Petitioner's edited version of the consent decree, however, omits the operative language defining the "election" to be supervised: "The Election Officer shall supervise the IBT election *described above* to be conducted in 1991." Pet. App. 41a (emphasis added). The "IBT election described above" includes not only the election of the International officers, but also the election of union delegates, who are nominated and elected by the rank and file. Pet. App. 39a. The description further includes the union delegates' nomination of the International officer candidates. Pet. App. 40a. Thus, the express terms of the consent decree contradict petitioner's limiting construction, and the district court order merely reiterated the unambiguous terms of the decree.

The plain language of the consent decree likewise forecloses petitioner's funding and staffing arguments. Pet. 8. The decree expressly provides for the court-appointed

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the courts without discussion reviewed the "interpretation" of a consent decree, see Pet. 14-15, the terminology is not determinative. Appellate review of the merits rests on whether the appellant consented to the order appealed from—or conversely, whether the order alters the legal relationship contemplated by the parties. See *Motorola, Inc. v. Computer Displays Int'l, Inc.*, 739 F.2d 1149, 1155 (7th Cir. 1984). See also *United States v. Western Elec. Co.*, 777 F.2d at 29 (appealability does not turn on what the court's order is called but on the substantive consequences of that order).

officers to have staffs, and it specifically requires the union to pay for compensation and costs of the officers and their staffs. Pet. App. 43a. The district court once again merely restated the terms of the consent decree. The only matter outside the pure terms of the decree was the offer by the United States to advance $100,000 for the court-appointed officers to draw upon, an amount that would then be subject to reimbursement by petitioner if the payments were proper and reasonable. Pet. App. 14a-17a. The district court's approval of this fund can hardly be characterized as an adverse modification—if indeed it is a modification in any sense—since the consent decree obligates *petitioner* to make the payments in the first instance. Pet. App. 43a.

B. Petitioner also renews its contention—again rejected explicitly by the district court and implicitly by the court of appeals—that monthly reports to the union membership, which reports are to include the district court's opinions, modified the consent decree and violated petitioner's rights under the First Amendment. Pet. 19-20.

Although petitioner's First Amendment rhetoric about being forced to publish speech with which it disagrees is engaging, the reporting requirements are plainly warranted under the express terms of the consent decree. Petitioner explicitly agreed in the decree to publish the reports of the court-appointed Administrator in its union magazine, the *International Teamster*. Pet. App. 42a. Since the *International Teamster* was published monthly at the time the parties entered into the decree (and had been so published for the preceding five years), it was perfectly consonant with the decree to construe as authorizing monthly reports the Administrator's authority to report to the membership "at 'reasonable' times" and "in each issue of the *International Teamster*." What is more, those monthly reports need not even appear in the *International Teamster*. Petitioner can choose to publish its magazine quarterly, as long as it

underwrites the monthly reports to union members contemplated in the consent decree. Pet. App. 24a.

The consent decree also expressly authorizes the Administrator to report on the activities of the "Administrator, Investigations Officer and Election Officer." Pet. App. 42a. Nowhere does the consent decree limit the reports to matters with which petitioner agrees. Since the court proceedings relate to the activities of the court-appointed officers, it is well within the express terms of the consent decree to require the union to publish the district court's decisions. Once more, the district court simply upheld and applied the terms of the decree.

3. The court of appeals' decision to dismiss petitioner's appeals for lack of jurisdiction, rather than to affirm summarily the district court's orders on the merits, was not questioned by petitioner below and is a matter of form not worthy of this Court's attention.

As illustrated by the cases cited at pp. 9-10, *supra*, the courts of appeals frequently dismiss appeals for want of jurisdiction, rather than summarily affirm on the merits, when, as here, the only question on appeal is whether an order is within the scope of a consent decree. In such an appeal, there is no practical difference between a *dismissal* (based on the party's consent and waiver of appeal) and a summary affirmance (based on the party's consent to the order from which the appeal is taken). In both instances, the court of appeals' decision represents its considered determination that the appellant consented to the orders entered by the district court and cannot thereafter challenge them on the merits.

In this case, the government's memoranda and the court of appeals' disposition on the basis of those memoranda leave no doubt that waiver is the basis for the dismissal of petitioner's appeals. In its motions to dismiss, the govern-

ment urged dismissal on precisely that ground. See pp. 5-7, *supra*. And by dismissing the appeals, the Second Circuit evidenced its agreement with the government (and the district court) that the orders at issue here were well within the scope of the decree to which petitioner had consented. For that reason, the dismissals of the appeals are in substance equivalent to summary affirmances on the merits.

Finally, petitioner never argued below that if the court of appeals disagreed with petitioner's contention that the district court's orders imposed conditions not in the consent decree, it should not dismiss the appeals but rather should summarily affirm. Instead, petitioner staked its entire argument on the premise that the district court's orders exceeded the terms of the consent decree, and omitted any discussion of the appropriate disposition if the Second Circuit rejected that premise. It is too late for petitioner to fault the court of appeals for not adopting an argument that it failed to make.

* * * * *

In sum, 28 U.S.C. 1291 (authorizing appeals from final decisions) does not help petitioner here because petitioner's consent to the decree waives review of the merits of that decree. Similarly, 28 U.S.C. 1292(a)(1), which authorizes appeals of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions," does not help petitioner because the assertion of jurisdiction under that Section on the basis of a modification of an injunctive order requires the court of appeals to inquire whether an injunction has in fact been modified. See, *e.g.*, *Thompson* v. *Enomoto*, 815 F.2d 1323, 1326-1327 (9th Cir. 1987); *Bradley* v. *Milliken*, 772 F.2d 266, 270-271 (6th Cir. 1985); *Motorola, Inc.* v. *Computer Displays Int'l, Inc.*, 739 F.2d 1149,

1154-1155 (7th Cir. 1984). The existence of a modification is a jurisdictional fact that is condition precedent to appellate review. See 28 U.S.C. 1292(a)(1); *Thompson* v. *Enomoto*, 815 F.2d at 1326-1327; *Motorola, Inc.* v. *Computer Displays Int'l, Inc.*, 739 F.2d at 1155; *Hoots* v. *Pennsylvania*, 587 F.2d 1340, 1348 (3d Cir. 1978). See also *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981). Cf. *FW/PBS, Inc.* v. *Dallas*, 110 S. Ct. 596, 607 (1990) (plurality opinion) (appellate court must inquire into its jurisdiction over an appeal); *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (same). No such modification has been found here.

At bottom, the only dispute between the parties is whether or not the district court merely considered and determined matters to which petitioner had already consented. The court of appeals' fact-bound application of well-settled law does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
ROBERT M. LOEB
Attorneys

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